



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GENGHIS KHAN ALI STEVENSON,
CDCR #P-46050,

Plaintiff,

vs.

DURAN HARMON, Correctional Officer;
D. RUSH, Correctional Officer;
S. VELASCO, Correctional Officer,

Defendants.

Civil No. 07-1619 W (NLS)

**ORDER DIRECTING U.S.
MARSHAL TO EFFECT SERVICE
OF PLAINTIFF'S FIRST
AMENDED COMPLAINT TO
FED.R.CIV.P. 4(c)(2) & 28 U.S.C.
§ 1915(d)**

I. Procedural History

Plaintiff, Genghis Khan Ali Stevenson, a state prisoner currently proceeding pro se, submitted this civil rights action pursuant to 42 U.S.C. § 1983 on August 15, 2007. On December 4, 2007, the Court granted Plaintiff's Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a), but dismissed his Complaint sua sponte for failing to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Plaintiff filed his First Amended Complaint ("FAC") on January 7, 2008.

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II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A

As this Court noted in its December 4, 2007 screening Order, the Prison Litigation Reform Act ("PLRA") obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program," and who seek "redress from a governmental entity or officer or employee of a governmental entity," "as soon as practicable after docketing." See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte dismiss any prisoner and all other IFP complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing an IFP or prisoner's suit make and rule on its own motion to dismiss before directing that the Complaint be served by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 ("[S]ection 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint that fails to state a claim."); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing § 1915A). "[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) "parallels the language of Federal Rule of Civil Procedure 12(b)(6)").

Here, the Court finds that Plaintiff's retaliation claims found in his First Amended Complaint survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and that Plaintiff is therefore automatically entitled to U.S. Marshal service upon Defendants on his behalf. See *Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) ("The officers of the court

1 shall issue and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(2)
 2 (providing that “service be effected by a United States marshal, deputy United States marshal,
 3 or other officer specially appointed by the court ... when the plaintiff is authorized to proceed
 4 *in forma pauperis* pursuant to 28 U.S.C. § 1915.”). However, Plaintiff is cautioned that “the sua
 5 sponte screening and dismissal procedure is cumulative of, and not a substitute for, any
 6 subsequent Rule 12(b)(6) motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*,
 7 481 F.Supp.2d 1115, 1119 (S.D. Cal. 2007).

8 **III. Conclusion and Order**

9 Good cause appearing, **IT IS HEREBY ORDERED** that:

10 1. The Clerk shall issue summons as to Plaintiff’s First Amended Complaint upon
 11 Defendants, provide Plaintiff with a certified copy of this Order, the December 4, 2007 Order
 12 Granting IFP [Doc. No. 4], and his First Amended Complaint [Doc No. 7], and forward them
 13 to Plaintiff along with a blank U.S. Marshal Form 285 for each Defendant named in the
 14 Amended Complaint. Plaintiff shall complete the Form 285s and forward them to the United
 15 States Marshal. Thereafter, the U.S. Marshal shall serve a copy of Plaintiff’s First Amended
 16 Complaint, and summons upon Defendants as directed by Plaintiff on each U.S. Marshal Form
 17 285. All costs of service shall be advanced by the United States pursuant to 28 U.S.C. § 1915(d)
 18 and FED.R.CIV.P. 4(c)(2).

19 2. Defendants are thereafter **ORDERED** to respond to the First Amended Complaint
 20 within the time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a).
 21 *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted to “waive the
 22 right to reply to any action brought by a prisoner confined in any jail, prison, or other
 23 correctional facility under section 1983,” once the Court has conducted its sua sponte screening
 24 pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary
 25 determination based on the face on the pleading alone that Plaintiff has a “reasonable
 26 opportunity to prevail on the merits,” Defendants are required to respond).

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1 3. Plaintiff shall serve upon Defendants or, if appearance has been entered by
2 counsel, upon Defendants' counsel, a copy of every further pleading or other document
3 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
4 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
5 of any document was served on Defendants, or counsel for Defendants, and the date of service.
6 Any paper received by the Court which has not been filed with the Clerk or which fails to
7 include a Certificate of Service will be disregarded.

8 **IT IS SO ORDERED.**

9 DATED: 3/12/08


10 **HON. THOMAS J. WHELAN**
11 United States District Judge